BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| APPLETON PROFESSIONAL POLICE ASSOCIATION WPPA/LEER | Case 286 No. 42301 MA-5648 |
| and | |
| CITY OF APPLETON (POLICE DEPARTMENT) | |

Appearances:

Mr. Steve Urso, Wisconsin Professional Police Association/LEER Division, 7 North Pinckney Street, Madison, Wisconsin 53703, on behalf of the Association.

Mr. Greg J. Carman, City Attorney, 200 North Appleton Street, Appleton, Wisconsin 54911-4799, on behalf of the City.

## ARBITRATION AWARD

The Appleton Professional Police Association, WPPA/LEER, hereafter the Association, and the City of Appleton, hereafter the City, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the City concurred, that the Wisconsin Employment Relations Commission designate a staff member to hear and decide a grievance concerning the meaning and application of the terms of the agreement relating to sick leave. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Appleton, Wisconsin, on August 22, 1989; it was not stenographically recorded. Briefs were received by November 1, 1989. On November 22, 1989, the parties waived their right to submit reply briefs, thereby closing the record.

## ISSUE

Did the City violate Article XI, Section A of the collective bargaining agreement when it denied Officer Francix Gitter accrual of three days paid sick leave for the period November, 1988 to January, 1989?

If so, what is the remedy?

## RELEVANT CONTRACTUAL LANGUAGE

ARTICLE XI - LEAVES

A. Sick Leave

1. All Officers shall be granted sick leave with pay at the rate of one working day for each full month of service. Sick leave shall accrue from the Officer's starting date but may not be taken during the first sixty (60) days of employment.

## BACKGROUND

Francis Gitter, the grievant, was, at all times relevant to this proceeding, a Patrol Officer with the City of Appleton Police Department. This grievance concerns the City's denial of three days accrued sick leave during a three-month period when Gitter was on approved, paid sick leave.

The facts regarding Gitter are not in dispute. To accommodate necessary surgery, Gitter took sick leave for four days in October, 1988; 20 days in November, 1988; 15 days in December, 1988, and 15 days in January, 1989.

Upon reviewing the monthly posting in March, 1989, Gitter learned that he had not been credited with accrued sick leave for the months of November and December, 1988 and January 1989, which matter Gitter grieved on April 3, 1989. On or about June 1, 1989, City Director of Administrative Services/Director of Personnel David Bill wrote to the Association staff representative S. James Kluss as follows:

> Based on the information presented at our meeting of May 23, on the above matter, and on the City's leave policies and records, it is my determination that the grievance is without merit.

> Mr. Gitter's sick leave accumulation was properly calculated based upon the City's Personnel Policies and upon a long-standing consistent past practice. The grievance, therefore, is denied.

The Personnel Policies to which Bill referred, which apply to non-represented employes and to employes "so covered when specific contracts do not provide to the contrary", state as follows:

CHAPTER 12 - FRINGE BENEFITS

12.07 - Sick Leave

> (i) An employee on leave of absence without pay or on sick leave for more than fifteen calendar days in a month shall not accumulate sick leave for that month.

The previous codification of personnel rules, adopted by the Common Council in 1981, did not contain this, or any similar provision. The City attributes this to omission by inattention rather than intention.

Officer Gitter has since retired. The City's denial of sick leave accrued for the period in question reduced his retirement pay-out.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

> The City violated the collective bargaining agreement when it unilaterally deducted sick leave days from the grievant. Article XI, paragraph A-1 provides that all officers shall be granted sick leave with pay at the rate of one working day for each full month of service. By remaining on the payroll, the grievant was continuously employed and in the service of the employer, receiving his normal rate of pay, and receiving credit with the Wisconsin Retirement Fund for time in service to the City.
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> At no time was Gitter ever notified of the consequences of using sick leave; to his knowledge, he was earning sick leave while he remained on the payroll. Officer Gitter did not take a leave from service, and is thus within the contractual provision of a day's paid leave for each full month of service.
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> For the City to deny Officer Gitter the three days, it would be necessary for the City to show that he had violated the provisions relative to its use. The City never claimed, nor offered any evidence, that Officer Gitter violated any such rules.

> Further, the City's argument about an existing past practice is not substantiated by the testimony or the evidence. The June 22, 1970 memo from the former Director of Personnel to the former Police Chief, setting forth a general rule requiring an employe to be "actively at work" a minimum of 15 days to be eligible for sick leave accrual does not establish a valid past practice. The City must show that the Association knew of, and acquiesced in, this policy for it to be valid; but this policy was unknown to the Association until this grievance was under consideration. Indeed, the City could not offer any testimony or written documentation showing that the Association knew of this policy. The fact that there have been negotiations with other unions over this policy does not affect the Association. Nor does it matter that no individuals affected by this policy had previously complained; the City must show that the Association, not various individuals, was aware and accepting of this policy.
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> Finally, even if there were a past practice as the City claims, it cannot be enforced if it violates the collective bargaining agreement.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

> The City was applying its longstanding interpretation of the contract language in denying the accumulation of sick leave during the period the grievant was out of service recupterating (sic) from surgery. Essentially, in the absence of clear language in the contract, past practice in similar situations creates a precedent.
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> Such past practice is supported by evidence establishing that the operative contract language in question had remained constant since 1970; that such language had been applied to members of this bargaining unit for the purpose of denying sick leave accumulation, which application had not been grieved; that an internal 1970 memorandum stated that past practice denied sick leave accumulation of officers on sick leave status, and that such policy was contained in its 1985 personnel policies manual.
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> Such evidence, supplemented by Wisconsin precedent on past practice, clearly shows the City acted properly in denying sick leave accumulation. Given that neither this, nor any other City union has ever grieved the City's interpretation and application, the City's implementation of the ambiguous contract language should be given great weight. The grievance should be denied.

DISCUSSION

Part of this grievance can be considered, and sustained, in a summary fashion, namely, the grievant's entitlement to accrual of sick leave for the months of December, 1988 and January, 1989. The official City records for employe leaves, accepted into the hearing record as exhibit ER 1a-f, indicate that the grievant used precisely fifteen (15) days of sick leave for these months. The City's explicit position, however, expressed both in its published Policy 12.07(i), and through its purported past practice, is to deny sick leave accumulation when sick leave usage exceeds fifteen (15) days per month. As stated in Policy 12.07(i), sick leave accumulation is barred for an employe "on sick leave for more than fifteen calendar days in a calendar month". (emphasis added). Thus, even under the City's own theory, there is no justification for denying to the grievant accumulated sick leave for the months of December, 1988 and January, 1989.

Resolution of the remainder of this controversy is more difficult.

It is axiomatic that an arbitrator must first consider the language of the collective bargaining agreement; only if that language is ambiguous is recourse to such parol evidence as bargaining history and past practice appropriate. Of course, the benchmark of ambiguity is not whether the advocates disagree as to meaning and application, but rather whether the arbitrator finds some uncertainty or confusion in the language.

Here, I have no hesitancy in declaring I find the relevant language to be clearly ambiguous. At the very least, the operative phrase contains at least two ambiguous aspects, namely "each full month", and "of service". It is the

meaning of the combined phrase, "each full month of service", that is at the crux of this case.

The Association fails to offer a convincing explanation of why the agreement refers to "each full month", rather than just "each month". Like statutory construction, the interpretation of collective bargaining agreements presumes that words have meaning; a word without meaning is mere surplusage, a condition to be disfavored. At hearing, Association witness Officer Reed Holdorff, Association President, testified that this phrase was used to apply to employes who started with the City after the mid-point of a month. If this were so, however, it would cause some conflict with the following sentence, that sick leave "shall accrue from the Officer's starting date but may not be taken during the first sixty (60) days of employment". Moreover, notwithstanding this testimony, the record fails to show whether employes who started after the mid-point of a month, but reported for duty every assigned day that month, did or did not receive a sick leave day for that first month. In any event, both parties have focused their arguments not on the phrase "each full month", but rather on the phrase, "of service", so it is to that concept that I now turn.

The Association contends that "service" should be construed broadly, meaning that employes are in "service" whenever they are on pay status. That is, pay and/or benefits are to be interrupted only when an employe is on a formal leave of absence without pay. The City argues for a more restrictive interpretation, differentiating between the employment status (which includes both active duty and all paid leave status) and active service status (which excludes time on sick leave and unpaid leave of absence).

Thus, it is noteworthy that the very paragraph in which the disputed provision is found itself actually uses both concepts: the initial entitlement is expressed in terms of "each full month of service", followed immediately by the proviso that sick leave may not be taken "during the first sixty (60) days of employment". While not necessarily dispositive, this indicates that the parties understood that "service" and "employment" were different concepts, and used them advisedly, a conclusion which favors the City's interpretation.

Further, recourse to an accepted reference dictionary (The American Heritage Dictionary) is not particularly helpful in advancing the Association's interpretation of "service", in that "employment in duties or work for another . . . work or duties performed for a superior" implicitly connotes the actual execution of duties, rather than mere status. Here, by being on sick leave, grievant was not engaged in duties or work for the City. Thus, while not being dispositive, this consideration slightly favors the City.

The Association attaches significance to continuation by the City of its contribution to the grievant's retirement account during the period in question, suggesting that such constitutes a recognition that the grievant was thus to be "credited with service time" for this period. Review of the apparently applicable statutes, however, does not provide a clear answer in this regard. Pursuant to Sec. 40.02(14), Wis. Stats., "creditable current service" means the creditable service granted "for service performed and for which a participating employe receives earnings from a participating employer after the effective date of participation for that employer". That is, the Association suggests, by making retirement fund contributions, the City was acknowledging that there was "service performed" by the grievant. However, pursuant to Sec. 40.02(26), Wis. Stats., the employer-employe relationship continues until the end of the day on which the employe "last performed services for the employer, or, if later, the day on which the employe-employer relationship is terminated because of the expiration or termination of leave without pay, sick leave, vacation or other leave of absence". Thus, rather than supporting the Association's position, this provision suggests support for the City's position that sick leave is something other than the performance of services. Again, however, this consideration is not dispositive.

Thus finding that the language in question remains as ambiguous as at first review, I turn now to consider the City's arguments against this grievance.

The City contends it has a three-pronged support for its denial of accrued sick leave to the grievant: application of this very policy to other members of the bargaining unit; a 1970 memorandum from its former Personnel Director to the former Police Chief stating that such policy was a past practice, and Personnel Policy 12.07(i), adopted by the Common Council in 1985. 1/ But I find each leg of this tripartite structure too weak to support the City's contention.

It is well-settled that, to be mutually binding, an alleged past practice

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1/ Review of its written argument indicates that the City is not relying on the 1981 personnel manual, which, is noted earlier, does not contain the sort of limiting provision found in the 1985 version.

must be unequivocal, clearly enunciated, and readily ascertainable over a reasonable period of time. Celanese Corp. of America, 24 LA 168, 172 (Justin, 1954). At hearing, the City presented testimony, which the Union did not rebut, that the policy under review had been applied to seven members of this bargaining unit (one a member of the negotiating team) in calendar year 1988, with no resulting grievances. Did such occurrences establish a binding past practice? I think not. Notwithstanding the presence of one bargaining committee member in the group affected, there is no evidence that this matter was ever brought to the attention of the Association itself. Further, the record does not establish that there has been a subsequent contract bargained since the City's actions of 1988; thus there is no bargaining history to give its imprimatur to the City's application of the contract language. That is, had the Association been formally aware of the City's interpretation, and allowed the contract language to remain unchanged in a following contract, the City would have a strong case in this regard; but, as the facts are otherwise, so too is the conclusion.

Nor can the City rest its past practice argument on the 1970 memorandum from its former Personnel Director to the former Police Chief, wherein the practice in question is "refered (sic) to as past practice". Some personages, notably royalty, may have the power to make things so merely by stating that to be the case; but in municipal collective bargaining in Wisconsin, it takes more than a unilateral declaration of a past practice for one to arise. Accordingly, I find that the City has failed to meet its burden of establishing there to be a binding past practice in this regard.

I turn now to the 1985 Personnel Police 12.07(i), and find that it is substantively valid but procedurally deficient.

Pursuant to Article XVII, the Association "recognizes the right of the Employer to promulgate reasonable rules and regulations from time to time . . .". Therefore, in reviewing Policy 12.07(i), I will consider reasonableness to be the pertinent standard. 2/

Parties must be presumed to be aware of other elements in their agreement; there is an even greater presumption in this regard when, as here, the parties are sophisticated practitioners with a long history of collective bargaining.

2/ By definition, of course, provisions which are violative of the contract are inherently not reasonable.

This is the basis for the well-established arbitral principle that disputed provisions are not to be considered in isolation, but, instead, a contract should be read as an integrated text. See, Sioux City Community School District, LA 70 725, 728 (Greco, 1978).

As discussed earlier, the crux of this controversy is whether the Article XI reference to "service" is restrictive (i.e., exclusive of sick leave and leave of absence) or broad (i.e., inclusive of all time employed). I have already touched on the meaning to be drawn from the fact that Article XI refers to both "service" and "employment" in the same paragraph.

I note now that there is an additional article in this contract which provides for time off linked to length of tenure, namely Article VIII, Vacation. Although there are real and obvious distinctions between vacations and sick leave in general (i.e., sick leave is premised on medical need, while vacation is a blanket entitlement) and in specifics (i.e., here, sick leave can be banked, while vacation must be taken within certain time limits or be forfeited), there is sufficient underlying similarity to justify comparison between pertinent provisions. In that light, it is noteworthy that Article VIII, as does Article XI, actually uses both concepts: vacation entitlement is first expressed in terms of years "of service", followed immediately by the proviso that such benefits accrue at a rate of one-twelfth of the employe's entitlement "for each full month of employment". Again, by itself, this is not dispositive; however, this second example of the parties deliberately referring to both "service" and "employment" strongly indicates that they did so advisedly, and with the implicit understanding that such terms were in fact distinct.

The Association essentially asserts that the Article XI reference to "each full month of service" implicitly means "each full month of continuous employment". However, we have seen how both Article XI and Article VIII -- the two articles dealing with a tenure-based element of fringe benefits -- each make explicit reference to both "service" and "employment". Accordingly, on the basis of the collective bargaining agreement as interpreted using accepted arbitral principles, that it is reasonable to conclude that "each full month of service" is more restrictive than "each full month of employment".

Thus, because "each full month" must mean something other than "each month", and because "of service" must mean something other than "of employment", I find that Personnel Policy 12.07(i) would be a reasonable rule and regulation under the terms of the collective bargaining agreement and one not contrary to the provisions thereof. However, I decline to hold so explicitly, due to procedural deficiencies on the part of the City.

Pursuant to Article XVII of the collective bargaining agreement, the Association recognizes the right of the Employer to promulgate reasonable rules and regulations from time to time, "provided a copy is submitted to the Association ten (10) days before implementation". (emphasis added) At hearing, the City stated it could not establish that it complied with this requirement of a ten day notice. Therefore, the City cannot rely on Policy 12.07(i) as the basis for its action, at least insofar as applied to this particular matter.

Finding the Policy procedurally invalid, however, does not close the inquiry; for, even absent Policy 12.07(i), the City might enjoy the right to have this same policy, pursuant to the contractual provision that "all sick leave shall be subject to administration by the Police Chief". However, at all stages of this proceeding, namely, prior to the grievance, at hearing, and in written argument, the City has rested its case on past practice and the Personnel Policy; no mention was ever made of this matter coming as the product of administration by the Police Chief. Indeed, the record is bereft of any indication of direct involvement by said official in this regard. The City not having claimed involvement by the Police Chief, I shall not presume same.

Accordingly, having reviewed the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

## AWARD

That this grievance is sustained. The City shall, as soon as practicable, credit Francis A. Gitter with sick leave accumulation for the months of November, 1988, December, 1988, and January, 1989.

Dated at Madison, Wisconsin this 29th day of November, 1989.

By _____
Stuart Levitan, Arbitrator